Chronos and Kairos of Constitutionalism – The Polish case

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Το□ς π□σι χρόνος κα□ καιρ□ς τ□ πάντ□ πράγματι □π□ τ□ν ο□ρανόν.[1] This Septuagint translation of a verse from the book of Ecclesiastes points to a fundamental distinction regarding the transience – the distinction between *chronos* (time) and *kairos* (a right moment). Time is everlasting and consists of singular *kairoi*. *Kairos*, being its constitutive part, should not defy the structure of time. This distinction bares on the way in which we should understand any change of a constitution that claims to belong to free and equal citizens.

This is not only a purely scholarly debate. On March 9th 2016, during the proceeding on the so-called 'reparative' December act on the Constitutional Tribunal , the Tribunal attempted to determine whether it could assess constitutionality of constitutional amendments.[2] Relying on the Ackermanian idea of the so-called 'constitutional moments', the Tribunal sought to determine whether there exist principles or values so fundamental as to be immutable even by a constitutional majority – such as the principle of human dignity or the principle of separation of powers. Unfortunately, no conclusive answers were given.

I would like to pick up on this ambitious and difficult theoretical question and provide a plausible solution to the conundrum that the Constitutional Tribunal identified and subsequently failed to solve. I am interested in answering the question of whether the Tribunal *can* perform a review of constitutional amendments. The question of *how* (procedurally) and *when* (politically) such a review should be performed would require a lengthier analysis.

At first glance, textual analysis of the article 235 of Polish Constitution does not enshrine substantive limitations of constitutional amendment. Only procedural limits are established therein. The article stipulates that a bill of amendment can be proposed by the 1/5 of the members of the Sejm, the whole Senate and the President of the Republic. The bill should be subsequently approved by the Sejm (2/3 of its members) and Senate (absolute majority of its members). Should a bill of amendment introduce changes to chapter I (the fundamental principles of the state), II (fundamental rights and liberties), or XII (the constitutional amendment procedure), the amendment (prior to its signature by the President of the Republic) can become subject to a popular referendum. Subsequently, the President of the Republic has 21 days to sign the amendment and publish it in the Official Gazette.

Scholars (with some exceptions)[3] seem to take for granted that the constitution limits the bearer of constituent power only by procedure, and not by substance.[4] By arguing so, they claim that the bearer of constituent power must remain 'sovereign' as the constitution it produces should be an expression of 'a freely declared will of the collective sovereign'.[5] Does it really mean that the bearer of constituent power remains unfettered?

Constitutional democracy is a system founded on a seemingly problematic marriage of two principles: the principle of democracy and the principle of constitutionalism.[6] Whereas the former is given expression in a discourse over matters of common concern, the latter enshrines a set of rules, values, and principles which underlie the discourse and make it meaningful. So long as participants to the discourse – the citizens – are to remain free and equal, there must remain a set of (immutable) principles which protects the political power of people from being turned into violence. Otherwise freedom and equality would turn into a mere objectification. The principle of democracy accumulates the political power. The principle of constitutionalism, on the other hand, is supposed to rationalize it and tame it. In this sense constituent power cannot be understood as unfettered. It should be understood as no longer existent.

The concept of constituent power of people (CPP), coined by Sieyes, had only one task to deliver: to establish a polity of free and equal citizens.[7] CPP should be seen as a carrier of the fundamental *ought*. This *ought* (I call it the core of constitutionalism), once institutionalized, extinguishes CPP. The institutionalization of the *ought* – the

event that takes place usually in a revolutionary big-bang – marks the beginning of constitutional *chronos*. From this moment onwards a constitutional change (*kairos*) must not violate what is inherently normative even to the bearer of constituent power of people. This inherent normativity, once CPP creates a constitution, transforms itself into a normative core. This core, protected by constitutional courts in modern constitutional polities, is commonly expressed by what we call the 'trinitarian formula of constitutionalism': the rule of law, democracy and human rights.[8] Whereas neither can be had without the other two, all three simultaneously create a framework under which each citizen is allowed to pursue her own ends; use her freedom to the fullest extent possible; and to have her disagreements resolved in a satisfactory manner.[9]

Paradoxically, scholars who claim that CPP must be unfettered in order for the constitution it produces or amends to be a product of the exercise of free will – contradict themselves. There are rights (even if of meta-legal nature) which are presupposed by this claim. Basic rights must exist before the Rousseauan 'general will' could be actually exercised, unless of course we want to be trapped in a logical paradox. In short, popular sovereignty (the right to self-government) is co-original with the basic rights.[10] Second, scholars advocating unfetteredness of CPP violate the Humean principle of is/ought distinction. The norm authorizing the amendment does not allow that it be disrupted from within by introducing 'is' into its content. The latter case, as Carl Schmitt pointed out,[11] would signify an annihilation of constitutional regime – the end of constitutional chronos. Constitutional chronos would be destroyed by the 'existential element' brought into a constitution which would disrupt the framework of free and equals – the embodiment of CPP.

In order to make this claim more concrete, let us turn to the Czech Constitutional Court which dealt with similar problem. Czech constitution enshrines the so-called eternity clause (art. 9 para. 2). However, at the same time Czech Constitutional Court is not constitutionally authorized to perform judicial review of constitutional amendments. In order to perform such a review, the Court had to claim this authority, justify its doing so, and provide a standard of such a review.

The Court asserted that the Czech Constitution is founded on fundamental and inviolable 'values of democratic society' (Pl. ÚS 19/93). These values require that every legal act be endowed with legitimacy that does not result solely from a meticulous adherence to the law-making procedure. Legal acts, in order to be legitimate, must reflect a 'substantive-rational conception of legitimacy' which is inherent to the state governed by the rule of law. 'To do away with principles establishing this legitimacy would be to destroy the constitutional state as such'. Even 'a unanimous decision of Parliament could not infringe them'. Sovereignty of the Czech People is expressed in fundamental principles that are shared equally with other states governed by the rule of law (Pl. ÚS 50/04). Thus the European Union and the Czech Republic are systems that depend on, and mutually support each other as 'they were founded on the same principles' (Pl. ÚS 29/09). This normative core consists of 'guiding principles of inherent, inalienable, unsuspendable and non-repealable fundamental rights and freedoms of individuals, equal in dignity and rights' (Pl. ÚS 19/08). The core, in short, is a foundation of the political system the purpose of which is to concretize and protect these rights and freedoms (Pl. ÚS 36/05).

Czech Constitutional Court treats constitutional amendment first and fremost as regular statute. Only if it is enacted in a special procedure *and* because it fulfills the demands of principles and values that are *sine qua non* of popular sovereignty can this statute become endowed with the constitution-amending quality. In Court's opinion, unless constitutional amendments fall under the scope of Court's cognition, constitutional justice would be 'a mere slogan or proclamation without any normative conseqences – it would be turned into a political or moral challenge' (Pl. ÚS 27/09). The question remains – could Polish Constitutional Tribunal deploy similar reasoning? After all, Czech Constitutional Court and Polish Tribunal operate in polities of similar cultural and historical background.

I argue that in spite of there being no explicit eternity clause, the Constitutional Tribunal can assess constitutionality of constitutional amendments. In reviewing constitutionality of a constitutional amendment, the Constitutional Tribunal could rely on the preamble to the Constitution and the article 2 it enshrines ('the Republic of Poland shall be a democratic state governed by the rule of law').

First, the preamble stipulates that Polish people are 'equal in rights and obligations towards the common good – Poland' and hold 'culture rooted […] in universal human values […]'. These people 'establish this Constitution

[…] as the basic law for the state based on respect for freedom and justice, cooperation between the public powers, social dialogue, as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities'. Constituent power of the Polish people is hence transmuted into the core which underlies the constitution while, at the same time, it remains its inherent part. The constitution establishes a polity of free and equal citizens in order to 'pa[y] respect to the inherent dignity of the person'.

Second, given the substance of the article 2, any bill of constitutional amendment should fulfill the above-mentioned requirements. Interestingly, prior to the enactment of the 1997 Constitution, the norm enshrined in that article served the Tribunal as the source of principles that are claimed to lie at heart of constitutional democracy. The Tribunal elicited from the principle of the rule of law, *inter alia*, the right to impartial court (ruling K8/91), the principle of proportionality (ruling K 11/94), the right to life (ruling K26/96) and the right to privacy (ruling 21/97). After the enactment of the 1997 constitution, the principle of the rule of law, enshrined in the article 2, 'became an interpretative clause' (ruling K28/97). By adhering to this interpretative clause, the Tribunal e.g. confirmed validity of the irrevocable principle of *lex retro non agit* (ruling Kp 2/08) and the principle of reasonable *vacatio legis* (in a set of rulings).[12]

I can see no reason why the article 2 of the constitution should not be used as interpretative tool in assessment of constitutionality of constitutional change. Whether the Tribunal finds courage to go against the dangerous dogma constituent power's unfetteredness remains to be seen. The delicate political situation requires prudence.

But we should not forget that constitutional *chronos* is about constitutional change. Constitutions must 'run in order to stay still'.[13] However, constitutional *kairos* must remain congruent with constitutional *chronos* which has started at the time when the *fundamental ought* was deployed. This *ought* is the fundament of constitutional order that encompasses all existing constitutional democracies. Constitutionalists and constitutional courts should be aware of this fact. Otherwise an 'existential' *kairos* may bring forth a new principle – a new *ought*. A new principle, created by constitutional power that does not belong to people. A new principle which deprives citizens of freedom and equality by objectifying them vis-à-vis state, a group of people, or an individual. This new *ought* would start a different *chronos* – a different polity. A polity which as a constitutional scholar I have not examined, and which as a human being I simply abhor.

[1] Eccl. 3-1.

[2] The stenograms of proceedings (in Polish) can be found here: http://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2047/15 (the relevant part starts at page 103 ff.).

[3] Leszek Garlicki, *Normy konstytucyjne relatywnie niezmienialne* in: Janusz Trzciński (ed.), *Charakter i struktura norm konstytucji* (1997), pp. 139-141.

[4] Wojciech Sokolewicz, *Rozdział XII: Zmiana Konstytucji* in: Leszek Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej: Komentarz* (2003), pp. 1-40.

[5] Wiesław Skrzydło (ed.), *Polskie Prawo Konstytucyjne* (1999) p. 35.

[6] Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy* in: Douglas Greenberg & Stanley N. Katz, *Constitutionalism and Democracy: Transitions in the Contemporary World*, 1993, pp. 3-8.

[7] Mario Dogliani, *Potere Costituente e Revisione Costitutzionale* XV (1995) Quaderni Costituzionali N. 1, p. 27

[8] Mattias Kumm, *Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly so Called,* in: 54 Am. J. Comp. 2006, pp. 505-530.

[9] Cf. e.g. Ronald Dworkin, *Justice for Hedgehogs* (2010) pp. 321-323; Jürgen Habermas*, Between Facts and Norms – Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans.) (1996) p. 192

[10] Jürgen Habermas, *Constitutional Democracy – a Paradoxical Union of Contradictory Principles?* 29 (2001) Pol. T. pp. 778-779.

[11] Carl Schmitt , *Constitutional Theory* (J. Seitzer trans.), p. 68

[12] Cf. Leszek Garlicki, *Polskie Prawo Konstytucyjne – Zarys Wykładu* (2015) p. 61.

[13] Walter F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (2007), p. 523

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